(3)

No. 87-1485

In The

Supreme Court of the United States

October Term, 1988

ARTHUR J. BLANCHARD,

Petitioner,

v.

JAMES BERGERON, SHERIFF CHARLES FUSELIER, ABC INSURANCE COMPANY, DEF INSURANCE COMPANY, BARRY BREAUX, OUDREY GROS, JR., DARRELL REVERE, OUDREY'S ODYSSEY LOUNGE, GHI INSURANCE COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

After a successful civil rights trial under 42 U.S.C. §§ 1983 and 1988, compensatory and punitive damages were awarded to the Plaintiff, Arthur J. Blanchard. Counsel, under § 1988, made application for an attorney's fee with all supporting documents. The district court awarded a fee of SEVENTY-FIVE HUNDRED ($7,500.00) DOLLARS. Costs and expenses were awarded in the amount of $886.92. Counsel considered both amounts insufficient for the time and effort involved. An appeal was taken to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit, by Judgment rendered November 10, 1987, lowered counsel's fee to $4,000.00 holding that there was a contingent fee agreement and the agreement served as a "cap" on the amount of attorney's fee recoverable. In adhering to that theory, the Court did not consider nor did it include as a part of the fee the time spent by and valuable services of paralegals and law clerks.

The questions presented, therefore, are:

1. Does an agreement between the client and his counsel serve as a "cap" to limit the award of attorney's fees under the Civil Rights Attorney's Fee Award Act of 1976 (42 U.S.C. § 1988)?

2. Should the time of paralegals and law clerks be considered in the award of a reasonable attorney's fee under 42 U.S.C. § 1988?

Within the scope of question 1 are the correlative issues of (a) an award of a fee for the time devoted to the fee application and (b) the reasonableness of the time and hourly rate requested.

LIST OF PARTIES NOT OTHERWISE NOTED IN THE TITLE

The actual parties at interest in this proceeding are James Bergeron (former Deputy Sheriff), Sheriff Charles Fuselier, (Sheriff of St. Martin Parish, Louisiana), American Druggist Insurance Company (in Liquidation), and the Louisiana Insurance Guarantee Association. All interests are represented through one attorney, Mr. Edmond L. Guidry, III, Attorney at Law, Guidry & Guidry, 324 S. Main Street, St. Martinville, Louisiana 70582. There are no other parties at interest in the present proceeding despite their appearance in the original title.

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N.B.: Counsel for Petitioner and Respondent agree that an appendix, other than that included in the Petition for Writ of Certiorari is unnecessary. Accordingly, a separate Joint Appendix has not been developed. A Motion for Leave To Dispense With Filing A Joint Appendix has been submitted to the Court. Supreme Court Rule 30.1.

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JAMES BERGERON, SHERIFF CHARLES FUSELIER, ABC INSURANCE COMPANY, DEF INSURANCE COMPANY, BARRY BREAUX, OUDREY GROS, JR., DARRELL REVERE, OUDREY'S ODYSSEY LOUNGE, GHI INSURANCE COMPANY,

Respondents.

BRIEF ON BEHALF OF PETITIONER ARTHUR J. BLANCHARD

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit was entered on November 10, 1987, and is reported at 831 F.2d 563 (5th Cir. 1987); it is reprinted in the Certiorari Appendix at pages 1A - 5A.

There are two opinions from the United States District Court for the Western District of Louisiana. They are:

A. On Attorney's fees and costs: Judgment from the Monroe Division entered October 23, 1986 (Certiorari Appendix pages 6A through 16A).

B. The original Judgment on the jury verdict from the Lafayette Division entered May 30, 1986 (Certiorari Appendix page 17A through 18A).

JURISDICTION

The Supreme Court of the United States granted Arthur Blanchard's Petition for Writ of Certiorari on June 27, 1988, to review the judgment of the United States Court of Appeals for the Fifth Circuit. Jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The original statutes under which this matter was brought before the United States District Court were 42 U.S.C. § 1983 and § 1988.

This application for fees is brought under the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988 (Certiorari Appendix page 20A).

STATEMENT OF THE CASE

This Civil Rights case was originally filed in the United States District Court for the Western District of Louisiana (Lafayette Division) under 42 U.S.C. §§ 1983 and 1988. After a jury trial, it was found that the Plaintiff, ARTHUR J. BLANCHARD, had been assaulted without justification by Deputy Sheriff James Bergeron, a member of the Sheriff's Office of St. Martin Parish, Louisiana. The

assault took place in Oudrey's Odyssey Lounge. The Lounge, its owners and insurer were joined under pendent jurisdiction. In the beating, Mr. Blanchard suffered a broken jaw and other lesser injuries. The judgment based upon the verdict awarded Mr. Blanchard $5,000 compensatory damages and $5,000 punitive damages. (Cert. Appendix 17A).

After entry of the Judgment on the verdict, counsel for Arthur Blanchard submitted detailed time, cost, and expense records to support his application for an attorney's fee and costs under 42 U.S.C. § 1988. (R.* 84-85) Counsel's deposition was taken by opposing counsel. (R., *supra*, Exhibit A) The fee application included substantial time of paralegals and law clerks. The original fee request included time for a variety of services including investigation, depositions, pleadings, preparation and three trial days of the civil rights case; for the fee application, time was devoted to the file and time review, legal research, memorandum, counsel's deposition, etc. The total original fee requested was $36,780.00. Out-of-pocket costs and expenses amounted to $5,511.92. Of those amounts, the District Court awarded an attorney's fee of $7,500.00 plus costs and expenses in the amount of $886.92. Counsel appealed to the Court of Appeals for the Fifth Circuit. (R. 90).

As of the time shortly prior to the submission of the brief to the Fifth Circuit (but not including services or time for the research, writing, and submission of a reply brief, preparation for oral argument or presentation of

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* Record docket entry number

the case) counsel increased the total fee requested to $42,699.30. Costs increased by $329.32 for a total of $5,841.24.

The Court of Appeals, by Judgment dated November 10, 1987, decreed that the Fifth Circuit case of *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 718 (5th Cir. 1974) " . . . by which we are bound," required that a contingent fee contract " . . . serves as a cap on the amount of the attorney's fee to be awarded, although the court is not bound to enforce a contract for an unreasonably high fee." *Blanchard v. Bergeron*, et al, 831 F.2d 563, 564 (5th Cir. 1987).

The Fifth Circuit refused to allow the recovery of any law clerk or paralegal fees because their time would " . . . naturally be included within the contingency fee." Further, the Court of Appeals did not award a fee for the time spent on the attorney's fee application.

A Petition for Writ of Certiorari was submitted to the Supreme Court of the United States. It was granted on June 27, 1988.

SUMMARY OF ARGUMENT

The Fifth Circuit's *Blanchard* holding conflicts with prior decisions of the Supreme Court and of every federal circuit including the Fifth. The *Blanchard* court held that a contingent fee contract set a cap on the amount of fee an attorney could recover under the Civil Rights Attorney's Fee Award Act of 1976, 42 U.S.C. § 1988. Setting a contingent fee cap is contrary to the clear indication in *City of*

Riverside v. Rivera, infra, which rejected the setting of fees as a proportion of a damage award.

As part of counsel's fee application in the trial court, a substantial amount of time was submitted for work performed by law clerks and paralegals. The trial court rejected all of it. The Fifth Circuit did not address the issue, holding that the contingency included all time and services provided. The Supreme Court allowed legal assistants' time as part of an attorney's fee in *City of Riverside*, and many circuits, including the Fifth, have specifically made the time of law clerks and paralegals part of the civil rights attorney's fee recovery. The current, ethical, fiscally conservative practice of law requires specific confirmation by the highest Court that the valuable services of these legal assistants shall be recoverable.

The *Blanchard* decision is confusing because it does not direct, even under its "cap" theory, whether the "contingent" fee is to be paid *from* the amount recovered by the successful plaintiff or *by* the condemned defendant. The former would defeat the purpose of all of the civil rights and "private attorneys general" laws passed by Congress. Factually, the Fifth Circuit is in error in suggesting that the *Blanchard* holding prevents a windfall. The correctly applied standards of "lodestar" do not result in, but are intended to prevent a windfall either to the successful civil rights litigant or to his attorney.

Attorney's fees have traditionally been awarded to counsel for the time spent on efforts to recover a fee. Neither the trial court nor the Fifth Circuit considered or awarded any amount for the considerable time devoted to that effort.

Argument will be presented under the following headings:

I. *Blanchard* Conflicts With Rulings Of The Supreme Court of the United States.

II. *Blanchard* (Fifth Circuit) Conflicts With All Other Circuit Courts.

III. *Blanchard* Is Contrary To Decisions Within The Fifth Circuit.

IV. *Blanchard* Fails To Include The Time of Law Clerks and Paralegals as Part of the Attorney's Fee.

V. Factual and Procedural Confusion in *Blanchard*.

VI. Attorney's Fees Should Be Awarded For Time Devoted To The Fee Application.

VII. Fees and Time Claimed.

ARGUMENT

I. BLANCHARD CONFLICTS WITH RULINGS OF THE SUPREME COURT OF THE UNITED STATES

The Fifth Circuit's decision in *Blanchard v. Bergeron*, 831 F.2d 563 (5th Cir. 1987), appears to conflict with the ruling of this Court in *City of Riverside, et al v. Rivera*, 477 U.S. 561, 106 S.Ct. 2686, 91 L.Ed. 2d 466 (1986). In that case, the Supreme Court stated that:

"We reject the proposition that fee awards under § 1988 should necessarily be proportionate to the amount of damages a civil rights plaintiff actually recovers." *Id.* at 2694.

"A rule that limits attorney's fees in civil rights cases to a proportion of the damages awarded would seriously undermine Congress' purpose in enacting § 1988." *Id.* at 2695.

"A rule of proportionality would make it difficult, if not impossible, for individuals with meritorious civil rights claims but relatively small potential damages to obtain redress from the courts. This is totally inconsistent with the Congress' purpose in enacting § 1988." Id. at 2696.

" . . . [W]e find no evidence that Congress intended that, in order to avoid 'windfalls to attorneys,' attorney's fees be proportionate to the amount of damages a civil rights plaintiff may recover." *Id.* at 2697.

"In the absence of any indication that Congress intended to adopt a strict rule that attorney's fees under § 1988 be proportionate to damages recovered, we decline to adopt such a rule ourselves." *Id.* at 2698.

It is difficult to understand how this Court's language could refer to anything other than a contingent fee arrangement when it refused to limit § 1988 fees to a proportion of damages. *City of Riverside* specifically rejected an *amicus curiae* suggestion that civil rights fees be "modeled upon the contingent fee arrangements." *Id.* at 2694.

> "Moreover, the contingent fee arrangments that make legal services available to many victims of personal injuries would often not encourage lawyers to accept civil rights cases which frequently involve substantial expenditures of time and effort but produce only small monetary recoveries." *Id.* at 2696.

The *Blanchard* court also could have consulted *Pennsylvania v. Delaware Valley Citizens' Council*, ___ U.S. ___, 107 S. Ct. 3078 (1987), for guidance. After discussing the

Johnson case, the Court observed that, " 'In computing the fee, counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee paying client, for all time reasonably expended on a matter (citation omitted)' S. Rep. 6, U.S. Code Cong. & Admin. News 1976, p. 5913." *Id.* at 3086 See also *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933 (1983), especially footnotes 3 and 4, pages 1937 and 1938, noting and applying the *twelve* factors of *Johnson v. Georgia Highway Express, Inc., supra.*

Blanchard v. Bergeron, et al, should be reversed because it failed to follow the clear direction of the Supreme Court of the United States that a contingency fee agreement is not the only criteria in setting the attorney's fee for a successful § 1988 plaintiff.

II. *BLANCHARD* (FIFTH CIRCUIT) CONFLICTS WITH ALL OTHER CIRCUITS

The Fifth Circuit *Blanchard* decision is in conflict with every other circuit of the United States. All other circuits now subscribe to the lodestar method of computing attorney's fees under 42 U.S.C. § 1988, the Civil Rights Attorney's Fees Award Act of 1976. At a minimum, the lodestar approach is the beginning point. Many circuits have subscribed to the 12 factors set out by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc., supra* at 717-719, but none adhere to a rigid standard that a contingent fee agreement sets an upper limit on recovery of civil rights attorney's fees. The *Blanchard* opinion stated that the Fifth Circuit was "bound" by *Johnson* to set the

cap, apparently referring to dictum[1] in that 1974 case decided before the Civil Rights Attorney's Fee Award Act of 1976.

The circuit opinions which are contrary to the holding of the Fifth Circuit *Blanchard* decision are:

The First Circuit: *Wojtkowski v. Cade*, 725 F.2d 127 (lst Cir. 1984); *Wildman v. Lerner Stores Corp.*, 771 F.2d 605 (lst Cir. 1985); *Sargeant v. Sharp*, 579 F.2d 645 (lst Cir. 1978) [" . . . [W]e reiterate that a fee arrangement is irrelevant to the issue of entitlement and should not enter into the determination of the amount of a reasonable fee." *Id.* at 649.]; *Hall v. Ochs*, 817 F.2d 920 (lst Cir. 1987).

Second Circuit: *Lewis v. Coughlin*, 801 F.2d 570 (2d Cir. 1986) {"Contingency is but one of twelve factors which the Supreme Court has said should be considered in fixing a reasonable attorney's fee" *Id.* at 575, citing *City of Riverside v. Rivera, supra*]; *Wheatley v. Ford*, 679 F.2d 1037 (2d Cir. 1982); *Dominic v. Consolidated Edison Co. of N.Y., Inc.*, 822 F.2d 1249, 1259 (2d Cir. 1987).

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1 "In no event, however, should the litigant be awarded a fee greater than he is contractually bound to pay, if indeed the attorneys have contracted as to amount." *Johnson, supra* at 718. However: " . . . Judge Holloway noted that problems arise in applying the *Johnson* dictum . . . ." *Cooper v. Singer*, 719 F.2d 1496, 1500, note 6 (10th Cir. 1983), and "*Johnson* was a civil rights case decided before the enactment of the Civil Rights Attorney's Fee Award Act 42 U.S.C. § 1988 (1976), and thus is inapplicable." *Fleet Investment Co, Inc., v. Rogers*, 620 F.2d 792, 793, note 1 (10th Cir. 1980).

Third Circuit: *Sullivan v. Crown Paperboard Co., Inc.*, 719 F.2d 667 (3d Cir. 1983) ["At its clearest, the legislative mandate would therefore have courts consider the existence of contingency arrangements, while not allowing such consideration to thwart the enforcement of the substantive statutory rights that gave rise to the fee award provision." *Id.* at 669]; *Durett v. Cohen*, 790 F.2d 360 (3d Cir. 1986).

Fourth Circuit: *Vaughns v. Board of Education of Prince George's County*, 770 F.2d 1244 (4th Cir. 1985); *Harrington v. Empire Const. Co.*, 167 F.2d 389 (4th Cir. 1948).

Sixth Circuit: *United Slate Tile & Composition Roofers et al v. G. & M. Roofing and Sheet Metal Co.*, 732 F.2d 495 (6th Cir. 1984) ["The existence of a contingency contract may be considered by the District Court as an element to be considered in determining the market value of an attorney's services, but the Court is not bound in any sense by that agreement." *Id.* at 504.]

Seventh Circuit: *Lenard v. Village of Melrose Park*, 699 F.2d 874 (7th Cir. 1983) ["The trial court may consider as a factor the contingent fee contract, but it is not to be an automatic limit on the attorney fee award." *Id.* at 899]; *Sanchez v. Schwartz*, 688 F.2d 503 (7th Cir. 1982); *Hagge v. Bauer*, 827 F.2d 101 (7th Cir. 1987) ["If we were to read the district court's 'straight contingency fee analysis' to suggest that the contingency rate is *per se* reasonable, we would reverse because of the Supreme Court's emphasis on lodestar amounts in *City of Riverside v. Rivera* (citation omitted)" *Id.* at 111.]

Eighth Circuit: *Sisco v. J. S. Alberici Construction Co., Inc.*, 733 F.2d 55 (8th Cir. 1984) ["We hold that a percentage fixed in a contingent-fee contract is not an absolute ceiling on fee awards. We reverse and remand for a

determination by the District Court of a proper fee award in this case." *Id.* at 56. "These effects [[limitation of fee to a contingent fee contract]] would run counter to the intention of Congress to encourage successful, civil-rights litigation" *Id.* at 57.]

Ninth Circuit: *Hamner v. Rios*, 769 F.2d 1404 (9th Cir. 1985) [" . . . Section 1988 authorizes the award of a reasonable fee not necessarily limited to the fee agreed upon by the parties." *Id.* at 1408.]; *Manhart v. City of Los Angeles Dept. or Water and Power*, 652 F.2d 904 (9th Cir. 1981) ["The statute [[Title VII, 42 U.S.C. § 2000e-5(k), Section 706(k)]] authorizes payment of a reasonable fee, not the fee agreed upon by the parties and their attorneys. The fee agreed upon is therefore not decisive. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 718 (5th Cir. 1974); *Clark v. American Marine Corp.*, 320 F.Supp 709-711 (E.D. La. 1970), *aff'd* 437 F.2d 959 (5th Cir. 1971)." *Id.* at 909.]

Tenth Circuit: *Cooper v. Singer*, 719 F.2d 1496 (10th Cir. 1983) ["We therefore conclude that a section 1988 fee award should not be limited by a contingent fee agreement between the attorney and his client." *Id.* at 1503 (this is an excellent analysis of Section 1988 awards)]; *Fleet Investment Co., Inc. v. Rogers*, 620 F.2d 792 (10th Cir. 1980) [The limitation of fees in civil rights cases to a contingent fee contract " . . . would obviously frustrate the intent of Congress and we refuse to adopt such a rule." *Id.* at 793.]

Eleventh Circuit: The Fifth Circuit opinion in *Blanchard* cites the Eleventh Circuit case of *Pharr v. Housing Authority of City of Pritchard, Alabama*, 704 F.2d 1216

(11th Cir. *1983*) as support for its ruling that a contingent fee contract sets the upper limit in a § 1988 fee case. The Fifth Circuit could have better examined the more timely ruling in *Tic-X-Press, Inc. v. Omni Promotions Company of Georgia,* 815 F.2d 1407 (11th Cir. *1987*) in which that argument was rejected with the Court declaring, " . . . the District Court decided to determine a 'reasonable' fee by applying the twelve factors articulated in *Johnson v. Georgia Highway Express,* 488 F.2d 714 (5th Cir. 1974), without regard to a contingency fee agreement. Accordingly, the Court analyzed TXP's fee request in light of the *Johnson* guidelines and calculated the plaintiff's lodestar at $118,545.00 concluding that the hours expended and rates charged were reasonable." *Id.* at 1423. See also *Walters v. City of Atlanta,* 803 F.2d 1135 (11th Cir. *1986*), in which paralegal time was added to attorney time and the contingent fee agreement was "enhanced" by 35%. See also *Watford v. Heckler,* 765 F.2d 1562 (11th Cir. 1985), stating, "However, in assigning weight to other factors '[n]o one *Johnson* criterion should be stressed to the neglect of others' [citation omitted]. Although the amount involved is generally a factor to be considered, a fee award may not be limited to a 'modest proportion of the total monetary recovery' or even to 'the [total] amount recovered' " [citations omitted] *Id.* at 1569.

District of Columbia Circuit: *Laffey v. Northwest Airlines, Inc.,* 746 F.2d 4 (D.C. Cir. 1984); *cert. denied* 472 U.S. 1021, 1055 S.Ct. 3488 [supporting lodestar, the Court said, "The fee award must be recalculated according to the market rates established by those firms in their everyday practice." *Id.* at 30. The Court does not state whether or not there was a contingency fee contract. It refused to

approve a "contingency multiplier" and found no ground for a "contingency enhancer", both of which had been added to the lodestar calculation by the trial court.]; *Copeland v. Marshall,* 641 F.2d 880 (D.C. Cir. *en banc,* 1980) ["Contingency adjustments . . . are entirely unrelated to the 'contingent fee' arrangements that are typical in plaintiffs' tort representation." "The contingency adjustment is a percentage increase in the 'lodestar' to reflect the risk that no fee will be obtained" *Id.* at 893.]

The national policy question to be reviewed in the *Blanchard* case is broader than the *Blanchard* facts. It is respectfully suggested that if this Fifth Circuit opinion is allowed to stand, it may serve to deny successful civil rights attorneys a fee in such varied situations as (1) civil rights injunction proceedings, (2) the attorney and client have a contingent fee agreement contract but the client becomes bankrupt, [all funds could be held by the trustee], or (3) the client is or becomes incompetent and the validity of the contract is in question. A clear, national interpretation will serve to encourage participation by competent counsel who can rely upon a Supreme Court decision to insure an award of a reasonable fee in these highly contested civil right matters. It will enhance the intent of Congress in all of the civil rights statutes.

III. *BLANCHARD* IS CONTRARY TO DECISIONS WITHIN THE FIFTH CIRCUIT

In deciding *Blanchard*, the Fifth Circuit failed to follow its own recent rulings.

The Fifth Circuit chided counsel for not citing the 1974 *Johnson* case, and went on to base the *Blanchard*

limitation of fee squarely upon its ruling in *Johnson* which predated 42 U.S.C. § 1988. However, counsel extensively cited the Fifth Circuit's more recent ruling in *Copper Liquor, Inc. v. Adolph Coors, Co.*, (citations *infra*). The *Copper Liquor, Inc.* case was brought before the Fifth Circuit four times: *Copper Liquor* I, 506 F.2d 934 (5th Cir. 1975), *Copper Liquor* II, 624 F.2d 575 (5th Cir. 1980), *Copper Liquor* III, 684 F.2d 1087 (5th Cir. 1982) [overruled on the limited issue of expert fees as cost of court, *Gibbons v. Crawford Fitting Company*, 790 F.2d 1193 (5th Cir. 1986)] and *Copper Liquor* IV, 701 2d 542 (5th Cir. 1983). Cases II and III dealt with attorney's fees.

The following are quotations from *Copper Liquor* II:

> "We have encouraged district courts to apply the *Johnson* test flexibly in computing attorney's fees." *Copper Liquor* II, *supra* at 583.
>
> "Although all of the *Johnson* factors must be considered, recent decisions of this Court suggest that District Courts, in computing attorney's fees, should pay special heed to *Johnson* criteria numbers (1) the time and labor involved, (5) the customary fee, (8) the amount involved and the results obtained, and (9) the experience, reputation and ability of counsel." *Id.* [Particular note should be made that *Johnson* criteria number 6 deals with contingent contract considerations and is *not* among those listed to which "special heed" should be paid.]

Copper Liquor II reversed the district judge's award of an attorney's fee and remanded the issue for reconsideration. After a new fee award was made, the issue returned to the Fifth Circuit. Again noting with approval that special heed should be paid only to *Johnson* factors numbers 1, 5, 8, & 9, *Copper Liquor* III stated:

> " 'Whether the fee is fixed or contingent is one of the *Johnson* factors that the district judge must consider in calculating the reasonable attorneys' fees, but a 'district court is not bound . . . by the agreement of [counsel with his client] as to the amount of attorneys' fees.' *Copper Liquor* II, 624 F.2d at 583 n. 14." *Copper Liquor* III, *supra* at 1097.

The cited note 14 from *Copper Liquor* II reads:

> "A district court is not bound by, and may not merely ratify, the agreement of the parties as to the amount of attorneys' fees. *Piambino v. Bailey*, 5 Cir. 1980, 610 F.2d 1306, 1328."

In 1983, in *Riddell v. National Democratic Party*, 712 F.2d 165 (5th Cir. 1983), the Fifth Circuit found the lodestar method to be appropriate for calculating attorneys' fees. The court directed trial judges to " . . . articulate fully the reasons for their awards, including an indication of how the *twelve Johnson* factors affected the decision." [citing *Copper Liquor* II and III] *Id.* at 170 (emphasis on "twelve" supplied).

Patently, it was error for the Fifth Circuit to ignore its rulings in *Copper Liquor* II and III which were decided 6 and 8 years respectively after the *Johnson* decision.

IV. *BLANCHARD* FAILS TO INCLUDE THE TIME OF LAW CLERKS AND PARALEGALS AS PART OF THE ATTORNEY'S FEE

The *Blanchard* decision failed to account for the many hours of work performed by counsel's paralegals and law clerks to whom various tasks were assigned (at a substantially reduced rate calculation) and whose work provided excellent results to counsel and for the client. The *Blanchard* court stated, "Moreover, any hours 'billed' by

law clerks and paralegals would also naturally be included within the contingent fee." *Blanchard, supra* at 432.

The United States Supreme Court has approved compensation for law clerks in a similar case when it affirmed 84.5 hours of law clerk time as part of a $245,456.25 fee. See *City of Riverside, supra* at 2687 and 2698.

The First Circuit accepted the validity of charging separately for paralegals and law clerks in *Jacobs v. Mancuso,* 825 F.2d 559 (lst Cir. 1987). That court declared,

> "We . . . reject defendants' approach and also the view that, like the administrative staff, paralegals and law clerks should be considered part of the overhead included in counsel's fee. Rather, the use of such personnel is to be encouraged by separate compensation in order to reduce the time of more expensive counsel." *Id.* at 563.

The Fourth Circuit, in affirming a fee of $372,942.00, approved $40.00 to $60.00 per hour for law clerks and $35.00 to $50.00 per hour for paralegals. *Vaughns v. Board of Education of Prince Georgies' County,* 770 F.2 1244, 1245 (4th Cir. 1985).

The Sixth Circuit included paralegals in a § 1988 award in *Northcross v. Board of Education of Memphis City Schools,* 611 F.2d 624, 639 (6th Cir. 1979).

The Ninth Circuit approved a paralegal fee award twelve years ago in a Longshoremen's and Harborworkers' Compensation Act case; the court commented that:

> "One of the necessary incidents of an attorney's fees is the attorney's maintaining of a competent staff to assist him. Paralegals and other assistants can free the attorney for greater productivity in more important areas. . . . paralegal time at paralegal rates can reasonably be counted along with attorney's time as 'attorney fees' " *Todd Shipyards Corporation v. Director, Office of Workers' Compensation Programs,* 545 F.2d 1176, 1182 (9th Cir. 1976).

In 1983, the Tenth Circuit said, "We recognize the increasingly widespread custom of separately billing for the services of paralegals and law students who serve as clerks." *Ramos v. Lamm, supra* at 558.

The Eleventh Circuit included, as attorney's fees, paralegal time at $30.00 per hour. *Walters v. City of Atlanta, supra* at 1151.

More to the point, the Fifth Circuit granted its imprimatur to the award of fees for legal assistants. In the Title VII sex discrimination case, *Richardson v. Byrd,* 709 F.2d 1016 (5th Cir. 1983), *cert. denied,* 464 U.S. 1009, 104 S.Ct. 527 (1984), the Fifth Circuit approved fees ranging from $30 to $50 per hour for three paralegals. The court said arguments denying paralegal fees were without merit and stated that, "The record shows that the three paralegals assisted the lawyers at trial, organized and reviewed class members' claims, participated in telephone conferences with lawyers, witnesses, and class members, and performed complex statistical work." *Id.* at 1023. See also *Cruz v. Hauck,* 762 F2d 1230, 1235 (5th Cir. 1985).

A fee award is being claimed in the present case for the vital legal assistance of two law clerks and a senior paralegal. The work they performed had to be accomplished whether by partner, associate, paralegal or law

clerk. Specifically, Mr. K. Clark Phipps (then a senior student at Tulane Law School and now an attorney practicing in Oklahoma) assisted in legal research, the preparation of evidence, and the location of witnesses. He accompanied counsel to depositions where he suggested highly pertinent questions based upon his research. After the graduation of Mr. Phipps, Mr. Gregory Touchet became counsel's law clerk as a Tulane Law School senior student; he now is in practice in Lafayette, Louisiana. In addition to the gathering of evidence and dealing with witnesses, Mr. Touchet assisted counsel for three days at trial. Following that successful trial, he thoroughly researched and wrote the first drafts of both the trial court and, subsequently, Fifth Circuit briefs on the fee applications. The principal paralegal on the case,[2] Mrs. Karen Clesi Arthur, is a former legal secretary with over 10 years experience, a cum laude graduate of Tulane University, and holds a paralegal certificate as a graduate of the ABA accredited Tulane Paralegal Studies Program. At the time of the Blanchard trial, she had five years paralegal experience.

All work capable of being handled by law clerks and paralegals was delegated to them. By that delegation, counsel was effectively and ethically reducing the amount of higher rate fee time. To date, unfortunately, that has worked to counsel's detriment.

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[2] Counsel's secretary, Mrs. Marilyn Pisano Hansen, also performed some paralegal functions. Secretarial time was *not* included in the fee application but her paralegal functions were included. Prior to becoming counsel's secretary, she had performed duties as a legal secretary, paralegal, and office manager in another office.

In a broader sense, if attorneys cannot be compensated for the valuable services of legal assistants, it will adversely affect the promising future of the paralegal profession and the only generally accepted "internship" for law students. Needless to say, it will substantially increase the cost of legal services to clients. Fortunately, the granting of fees for legal assistants as part of the attorney's fee is the national trend.

In December, 1987, in an opinion by Judge Wisdom of the Fifth Circuit, the court wrote:

> "This court has long recognized that the work of paralegals and other nonlawyers is compensable as part of attorney's fees under the federal civil rights laws. See *Richardson v. Byrd*, 709 F.2d 1016, 1023 (5th Cir.), *cert. denied*, 464 U.S. 1009, 104 S.Ct. 527, 78 L.Ed.2d 710 (1983); *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717 (5th Cir. 1974)." *Concord Limousines v. Loloney Coachbuilders*, 835 F.2d 541, 547, N. 25 (5th Cir. 1987) [the reference to *Johnson* is noteworthy because the same court used *Johnson* to deny law clerk and paralegal fees only a month earlier in *Blanchard*.]

The Seventh Circuit put it succinctly: "We feel that the better rule is to allow compensation for law clerks as attorneys' fees under § 1988. Such policy encourages cost-effective delivery of legal services and, by reducing the spiraling cost of civil rights litigation, furthers the policies underlying civil rights statutes." *Cameo Convalescent Center, Inc., v. Senn*, 738 F.2d 836, 846 (7th Cir. 1984).

The United States Supreme Court has not specifically ruled upon the validity of the use of paralegals and law clerks in today's legal market. The indications, however, are clear that this Court and many circuits recognize the

utility of using paraprofessionals in saving time of the supervising attorney and saving money of the client. It is respectfully suggested that now is the opportunity for specific recognition of these facts by the Supreme Court of the United States. The time of paralegals and law clerks should be considered part of and be included in the calculation of total services for which an attorney's fee is due.

V. FACTUAL AND PROCEDURAL CONFUSION IN BLANCHARD

In addition to the Fifth Circuit's failure in *Blanchard* to follow a prior decision of the United States Supreme Court, and disregarding *Blanchard's* conflict with every circuit, the opinion is factually and procedurally confusing. Does the opinion mean that Arthur Blanchard must pay the $4,000.00 fee out of his own $10,000.00 damage recovery, or does it mean that the defendants must pay the $4,000.00 fee? The decision is silent. If it is the latter, clearly the fee is not the classic contingent fee since, in that situation, an attorney accepts as a fee part of that which his *client* recovers. If it is the former, then the decision is contrary to the intent of Congress; it would operate to the benefit of those who have violated civil rights and to the detriment of the victim. *City of Riverside, supra* at 2694, 2697, 2698. See also *Cooper v. Singer, supra.*

The Fifth Circuit decision in *Blanchard* also is confusing in the Court's statement that, "[T]he reason enunciated for this limit [the contingent cap allegedly required by *Johnson*] is that an appellant will not be given a windfall via § 1988." It is not the client who receives the attorney's fee as suggested by the Fifth Circuit, but it is

the attorney who receives the fee. And the attorney does not receive a "windfall" if the lodestar standards are correctly applied. *Blum v. Stenson,* 465 U.S. 886, 104 S.Ct. 1541, 1546 (1984); *City of Riverside, supra* at 2697.

VI. ATTORNEY FEES SHOULD BE AWARDED FOR TIME DEVOTED TO THE FEE APPLICATION

The *Blanchard* decision did not take cognizance of fees due for trial and appellate level work on the attorney's fee issue. This failure conflicts with stated Fifth Circuit policy in *Cruz v. Hauck, supra,* in which the court decreed, "It is settled policy that a prevailing plaintiff is entitled to attorney's fees for the effort entailed in litigating a fee claim and securing compensation." (citations omitted) *Id.* at 1233. See also *Riddell v. Nat'l Democratic Party,* 712 F.2d 165, 171 (5th Cir. 1983), *reh'g denied,* 718 F.2d 1096 (5th Cir. 1983) [the court remanded the case for consideration of plaintiff's time spent on recovering the attorney's fees]; *Weisenberger v. Huecker,* 593 F.2d 49 (6th Cir. 1979), *cert. denied,* 444 U.S. 880, 100 S.Ct. 170 (1979); *Bond v. Stanton,* 630 F.2d 1231 (7th Cir. 1980), *cert. denied,* 454 U.S. 1063, 102 S.Ct. 614 (1981). *Copper Liquor,* III, *supra.*

VII. FEES AND TIME CLAIMED

The original application (R. 84-85) of counsel for Arthur Blanchard sought attorney's fees on an hourly basis as follows:

Senior attorney, partner, trial counsel	150.00/hour
Associate attorney	115.00/hour
Paralegal	65.00/hour
Law clerk	25.00/hour

All amounts were based upon normal hourly billing rates in effect in *1986*.

The *Blanchard* ad hoc judge sitting in the Western District of Louisiana indicated that, " . . . plaintiff's rates are high and holds that $100.00/hour is a reasonable rate." (Cert. Appendix 14A). Apparently, the court believed counsel's fee rate and the rate of the associate attorney should be the same. Paralegal and law clerk time was not awarded.

From a total of all hours (partners, associates, law clerks, and paralegal) of approximately 385 hours, the trial judge awarded only 97 hours, 20 minutes. He then reduced the resulting $9,720.00 to $7,500.00 declaring an abuse of billing judgment but without any specification as required to justify the "adjustment downward."

The lodestar calculation method approved by the Supreme Court and every federal circuit (except the Fifth Circuit in *Blanchard*) requires that a computation be made of the number of hours of service multiplied by the normal hourly rate charged. Each hour was documented in conservative 10 minute intervals (many offices use 15 minute time segments). (R.84-85, deposition, Exhibit A). Counsel's reputation, after more than twenty years of trial practice, and the range of fees in the community

were set forth in affidavits attached to the trial court fee application memorandum. (R. *supra*, Exhibits B & C).

The Supreme Court approved a fee rate of $125.00 per hour in *City of Riverside, supra* at 2698. The Fifth Circuit, in May, 1987, approved fee rates of $175.00 per hour for lead counsel and $125.00 per hour for associate counsel. *Hall v. Ochs*, 817 F.2d 920, 928, (lst Cir. 1987). The Fifth Circuit, reversing a $100.00 per hour rate awarded by the Western District of Louisiana (the *Blanchard* district) stated, "The district court's reduction of Mr. Walker's hourly rate from $125 to $100 was error. . . . [W]e modify the district court's judgment to award attorney's fees at the rate of $125 per hour . . . " *Curtis v. Bill Hanna Ford, Inc.*, 822 F.2d 549, 552, 553 (5th Cir. 1987).

After the lodestar calculation, many courts then discuss the application of the twelve *Johnson* factors. But, the *Johnson* application itself has been cited as being in "disarray". *Bhandari v. First National Bank of Commerce*, 808 F.2d 1082, 1104 (5th Cir. 1987). It is easy to see why there is question: The *Blanchard* trial court proclaimed that, "Preclusion of other employment [a *Johnson* factor] should have been non-existent." (Cert. Appendix 13A); but if counsel spent time on *Blanchard*, is it not self-evident that the time detracted from other legal services? What of the three out-of-town trial days? The trial court declared that " . . . this was not a case of 'exceptional success' " *Id;* the plaintiff was awarded both compensatory and punitive damages against a deputy sheriff in a rural parish in a case where witnesses were afraid to testify. Mr. Blanchard was overjoyed with the result. The Fifth Circuit's "cap" in *Blanchard* further confirms the

"disarray" of the *Johnson* pre-§ 1988 criteria. Compare with *Copper Liquor,* II and III, *supra.*

Counsel requests the following fees:

Through trial on the merits	$	36,780.00
Through trial court fee application	$	3,910.30
Through Fifth Circuit appeal[3] (research, and writing appellate brief, reply brief, argument preparation, oral argument)	$	5,080.50
	$	45,770.80

Hours on the Supreme Court process:

Petition for Certiorari and partial completion of brief (through July 26, 1988)

Counsel: 130.25 hours

Paralegal: 19 hours

The hours counsel seeks are valid and supported. The fee rates are reasonable, especially when the length of time is considered before any fee payment will be made. And should not there be an additional, upward adjustment for practice before the Supreme Court of the United States?

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[3] The amount of $2,310.00 listed in Plaintiff-Appellant's Fifth Circuit brief, p.36, as "Fees for Appeal" included only partial time. It did not include finalization of the appellate brief, the reply brief, research on the appellee brief, argument preparation, or oral argument.

CONCLUSION

The rule set by the *Blanchard* decision is contrary to the intent of the Civil Rights Attorney's Fee Award Act and substantially differs from holdings of this Court and others throughout the United States. A consistent, unequivocal policy is needed to fulfill the intent of Congress, to reduce attorney's fee controversies in federal courts, to reward fairly attorneys who undertake unpopular civil rights cases, and to approve the nationwide, accepted usage of legal assistants by allowing their valuable time to be part of the fee of the attorney who supervises them. Accordingly, petitioner respectfully seeks the following relief:

1. A reversal of the Fifth Circuit decision in *Blanchard v. Bergeron, et al.*

2. A ruling conclusively establishing "lodestar" as the standard by which to calculate § 1988 fees.

3. A ruling that the *Johnson* criteria which conflict with "lodestar" should not be considered in a § 1988 award; in particular, that the existence of a contingent fee contract should not form a cap on any award.

4. A ruling that encourages attorneys to utilize legal assistants, paralegals and law clerks, and, as such, the endorsement of this Court that their work shall be considered part of the § 1988 attorney's fee.

5. A ruling that the time spent by the successful civil rights attorney in seeking or protecting his or her fee is compensable time.

6. A ruling that an hourly fee rate shall not be pegged to past precedent but should be computed by

current standards which are as timely and flexible as attorneys have been in applying the various civil rights statutes for the benefit of their clients.

7. A ruling that the fee rate of $150 per hour for counsel (with an additional amount for practice before the Supreme Court of the United States) and the lesser rates for others as set forth are consistent with the rulings of this Court and, therefore, are reasonable within the guidelines of Civil Rights Attorney's Fee Award Act of 1976.

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